Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RICOH ELECTRONICS, INC.,

Petitioners,

v.

JAMES HALUCK and MICHAEL LITTON,

Respondents.

On Petition For Writ Of Certiorari
To The Court of Appeal, Fourth Appellate District, Division Three, IN THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Superior Court for the State of California erred as a matter of law, in denying Petitioner's motion for summary judgment whereby Petitioner, as a subsidiary of a foreign-based corporation, sought to invoke the rights of its parent corporation provided for under the U.S.-Japan Friendship, Commerce, and Navigation treaty and thereby violate the Supremacy Clause of the United States Constitution found at Article VI, Clause 2.

2. Whether the Superior Court for the State of California erred in rejecting, as a matter of law, Petitioner's defense to Respondent's claim for discrimination by rejecting Petitioner's invocation of the U.S.-Japan Friendship, Commerce, and Navigation Treaty and thereby violate Article II, Section 2, Clause 2 of the United States Constitution which provides that the President "shall have the Power, by and with the Advice and Consent of the Senate to make Treaties provided two thirds of the Senator's present concur . . ."

3. Whether the Superior Court for the State of California erred as a matter of law, in denying Petitioner's motion for summary judgment whereby Petitioner, as a subsidiary of a foreign-based corporation,

may invoke the rights of its parent corporation provided for under the U.S.-Japan Friendship, Commerce, and Navigation treaty and thereby violate Article I, Section 8, Clause 3 of the United States Constitution which provides that the Congress shall have the power to "regulate commerce with foreign nations, and among the several states . . ."

PARTIES TO THE PROCEEDING IN THE COURT BELOW AND STATEMENT PURSUANT TO RULE 29.6

* Ricoh Electronics, Inc., a California corporation, ("Ricoh-USA"), a wholly-owned subsidiary of Ricoh Company, Inc., a corporation organized and existing under the laws of the State of New Jersey , and which is a wholly- owned subsidiary of Ricoh Company, Ltd. ("Ricoh-Japan"), a corporation organized and existing under the laws of Japan;
* Larry Vaughn, a resident of the State of Georgia;
* Houssam El Jurdi, a citizen of the United States;
* Yoshihiro Nomura, a citizen of Japan;
* Haruo Uesaka, a resident of the State of Georgia;
* Yoji Ide, a citizen of Japan;
* Yasuaki Muramatsu, a citizen of Japan;
* Michael A. Litton ("Litton"), an individual residing in California; and
* James Haluck, an individual residing in California.

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I. OPINIONS BELOW

The November 4, 2004 opinion/decision of the Supreme Court of California denying review of the Petition filed by Petitioner Ricoh-USA, is not reported, but is attached hereto as Exhibit "1" to the Appendices filed concurrently herewith.

The October 21, 2004 opinion/decision of the California Court of Appeals, 4th Appellate District, Division 3, rejecting Petitioner's Petition for Writ of Mandate is not reported, but is reproduced and attached hereto as Exhibit "2" to the Appendencies filed concurrently herewith.

The order / opinion of Superior Court of the State of California for the County of Orange, denying, as a matter of law, Petitioner's motion for summary adjudication invoking the protections of the U.S.-Japan FCN Treaty, is not reported, but exists in three forms. The trial court on September 28, 2004, issued a tentative opinion and posted said opinion/decision on the court's website, which can be found as Exhibit "3" in the Appendices filed concurrently herewith. The trial court also issued a more detailed tentative ruling on September 29, 2004, which can be found at

Exhibit "4" in the Appendices filed concurrently herewith. Lastly, in accordance with *California Code of Civil Procedure § 437(c)(g),* the trial court issued a formal ruling/opinion on November 8, 2004, which can be found at Exhibit "5", in the Appendencies filed concurrently herewith. None of the foregoing opinions are published.

II. JURISDICTION

This Court has jurisdiction to review by writ of certiorari any "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution . . . or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . or statutes of . . . the United States." *28 U.S.C. § 1257(a).*

The judgment below is plainly final for purposes of this Court's certiorari jurisdiction. As this Court has long recognized, "[t]here have been instances where the Court has entertained an appeal of an order that otherwise might be deemed interlocutory,

because the controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailing." *Republic Natural Gas Co. v. Oklahoma,* 334 U.S. 62, 68 (1948). As discussed below, absent an immediate stay from this Court, Petitioners face irreparable harm from the order of summary adjudication and the commencement of trial on December 6, 2004, where Petitioner's protection under the U.S. Japan FCN Treaty has been declared null and void. Trial is still in progress.

Moreover, in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975), this Court identified four categories of cases in which a judgment is sufficiently final to justify this Court's review even though further proceedings remain to be held in the state courts. The fourth such category permits review even in "those situations where the federal issue has been finally decided in the state courts with further proceedings pending..." and "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Id.* at 482-483.

The fourth *Cox Broadcasting* category is plainly applicable here. The federal questions presented by this case have been finally decided by the courts below. The Superior Court for the State of California, supported by the California Court of Appeals and the California Supreme Court, squarely rejected Petitioners' arguments that the U.S.-Japan FCN Treaty protected Ricoh-USA from the employment discrimination claims of Respondents. Accordingly, a federal issue has been conclusively resolved, and there is no need for further state court proceedings to finalize or crystallize the lower court's disposition of the federal questions involving the Treaty with Japan, a Treaty that had been negotiated by the President "with the Advice and Consent of the Senate." *Article III, Section 2, Clause 3, United States Constitution.*

Moreover, reversal of the court below on any of the federal questions presented in this case "would be preclusive of any further litigation on the relevant cause of action." 420 U.S. at 482-83.

Finally, it is readily apparent that "the California Supreme Court decision seriously erodes federal policy. *See* 420 U.S. at 483. In the instant case, the federal policy that is being seriously eroded by

the erroneous California Supreme Court decision is more than just policy: it is the Supreme Law of the Land. The President and the Senate are charged with the negotiation and execution and approval of treaties with foreign governments. *See Article II, Clause 2, U.S. Const.* For the California courts to directly and unequivocally disregard such constitutional mandates clearly interferes with the conduct of foreign relations and commerce with other nations delegated to the Congress and the President. *Id.; Article I, Section 8, U.S. Const.*

Moreover, those treaties are assured a status equal with other constitutional provisions. *See Supremacy Clause, Art. VI, Clause 2, U.S. Const.* Accordingly, *Cox* and related cases warrant review of "the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." 420 U.S. at 482-83; *accord Goodyear Atomic Corp.,* 486 U.S. at 178-79 (applying this exception where "the unreviewed decision of the Ohio Supreme Court might seriously erode federal policy in the area of nuclear production").

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clause 3 of the Constitution of the United States of America provides in pertinent part:

> "[That Congress shall have Power] to regulate Commerce with foreign Nations, and among the several States and among the Indian tribes."

Article II, Section 2, Clause 2 of the Constitution of the United States of America provides in pertinent part:

> "[The President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provide 2/3 of the Senators present concur . . ."

Article VI, Clause 3 of the Constitution of the United State of America provides in pertinent part:

> "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all

Treaties made or which shall be made, under the Authority of the United States shall be the Supreme Law of the Land; and Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Pursuant to this Court's *Rule 14.1(f)*, the provisions of California law involved in this case, including *California Code of Civil Procedure § 437c; California Labor Code § 970;* and *California Government Code § 12940,* as well as all other pertinent provisions of the Constitution of the United States of America, the United States Code, and various Treaties to which the United States is a party are reproduced at Exhibits "6" - "13" of the Appendices filed concurrently herewith.

IV. STATEMENT OF THE CASE

A. Introduction

By its decision on December 3, 2004, the California Supreme Court openly declared its repugnance to fundamental federal treaty rights protected by the Supremacy Clause of the United States

Constitution. California Supreme Court's decision affirmed a state trial court, where the trial judge explicitly declared his refusal to honor treaty rights and U.S. Supreme Court case law interpreting such treaty rights. Denial of fundamental constitutional rights concerning a federal treaty protected by the Supremacy Clause is presumed to be irreparable harm and a Writ of Certiorari from this Honorable Court to the California Supreme Court is absolutely essential as a matter of course.

The Superior Court for the State of California (trial court) on September 29, 2004 (with a formal written decision issued on November 8, 2004), held and declared as a matter of law that Petitioner Ricoh Electronics, Inc. ("Ricoh-USA" or "Petitioner"), a wholly-owned subsidiary of a Ricoh Company, Ltd. ("Ricoh-Japan"), a Japanese corporation, could not invoke the protections of the U.S.-Japan Treaty of Friendship, Commerce and Navigation in a lawsuit alleging employment discrimination by Respondents.

In seeking appellate review, both the California Court of Appeal and the California Supreme Court affirmed the trial court's refusal to recognize fundamental constitutional interests: (1) the

Supremacy Clause, (2) Article I, and (3) Article II of the United States Constitution. Thus Petitioner has been summarily denied relief by these State Court Appellate bodies on November 4, 2004, and December 3, 2004, respectively. Consequently, Petitioner now faces a trial which commenced on December 6, 2004, and then abruptly recessed until January 3, 2005. In this trial, the sole Federal question has been adjudicated with finality. Petitioner Ricoh-USA ***is barred as a matter of law from raising or enjoying the protections afforded under the FCN Treaty.***

Requiring Ricoh-USA even to stand trial to defend itself against claims of discrimination is an affront to the guarantees of the U.S.-Japan FCN Treaty. The FCN Treaty expressly recognizes the rights of companies of the signatories (that is, *both* the United States and Japan) to retain certain classes of employees, such as executives, attorneys or technical experts, "of their choice." 4 U.S.T. 2063, T.I.A.S. No. 2863, Article VIII(1).

The FCN Treaty promises "to foreign investors *the freedom to place their own citizens in key management positions,* thus facilitating their operational success in the host country."

MacNamara v. Korean Airlines, 863 F. 2d 1135, 1144-45 (3d Cir. 1988) (emphasis added) [construing Article VIII(1) of the Korean FCN Treaty, which is nearly identical to that of the U.S.-Japan FCN Treaty]. Thus, "discrimination in favor of foreign executives *given a special status by virtue of a treaty* and its implementing regulations is not equivalent to discrimination on the basis of national origin or race." *Fortino v. Quasar Co.,* 950 F.2d 389, 392 (7th Cir. 1991) (emphasis added).

Ricoh-Japan's and Ricoh-USA's freedom to place key Japanese personnel without fear of discrimination complaints, as guaranteed by the FCN Treaty, is a matter of international sovereignty. Interference with this protected right threatens to undermine the Supreme Law of the United States. Review by this Honorable Court of the summary denial of Ricoh-USA's invocation of the FCN Treaty is essential to settle the issue of whether domestic subsidiaries of foreign corporations enjoy the same protections that their parents do, when their parents place key personnel with the domestic subsidiary.

B. Facts and Procedural History

In 1973, Ricoh-USA, was organized as a wholly-owned subsidiary corporation of Ricoh Company, Ltd., a Japanese corporation organized and operating under the laws of Japan.[1] Based in Tustin, California, and Lawrenceville, Georgia, Ricoh-USA is Ricoh-USA-Japan's manufacturing subsidiary in the U.S. responsible for the production of toner and thermal media, plain-paper copier, and printed circuit board technology.

At Ricoh-USA, in particular, the rotation of Japanese "expatriate" executives into the corporate hierarchy permits Ricoh-USA to utilize and capitalize upon the unique knowledge and experience these individuals from Ricoh-Japan have with newly developed technology (i.e., the engineering and production of a new

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[1] Ricoh-USA was subsequently reorganized as a wholly owned (100%) subsidiary of Ricoh Corporation ("Ricoh-New Jersey"), organized and operating in the State of New Jersey, which in turn is a wholly owned subsidiary (100%) of Ricoh Company, Ltd. ("Ricoh-Japan"). Ricoh-New Jersey was incorporated as the sales component of Ricoh-Japan's U.S. business, while Ricoh-USA was incorporated as Ricoh-Japan's manufacturing arm. Ricoh-USA represents a small part of the worldwide operation of Ricoh-Japan, which consists of 376 subsidiaries and 28 affiliates that develop, produce, market, sell, and recycle office equipment, including copiers and printers, information equipment, optical devices. Nomura Decl. ¶ 2-3.

product line or technology developed in Japan). Thus, Ricoh-Japan will temporarily assign its uniquely qualified personnel to fill those needs. The appropriate individuals at Ricoh-Japan evaluate the identified needs and determine who, from among its managerial or technical staff in Japan, might appropriately fill the void at Ricoh-USA. Because virtually all of Ricoh-Japan's managerial and technical staff are Japanese nationals, the uniquely qualified personnel that Ricoh-Japan assigns to Ricoh-USA have been Japanese. Because they are assigned to Ricoh-USA on a temporary basis,[2] and remain employees of Ricoh-Japan, the Japanese expatriates are evaluated by individuals at Ricoh-Japan in accordance

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[2] The particular need as identified by Ricoh-USA dictates what type of visa application Ricoh-USA makes to the Bureau of Citizenship and Immigration Services ("BCIS"). Some expatriates have entered the U.S. on E-2, or treaty investor, visas, which provide non-immigrant status for a national of any country with which an appropriate treaty of navigation and commerce exists. *See* Immigration and Nationality Act ("INA"), *8 U.S.C. § 1101(a)(15)(E)*. Other individuals have entered the U.S. for assignment at Ricoh-USA on L-1A or L-1B visas, which provide non-immigrant status for multi-national executives and managers or employees with specialized knowledge of the company's products, processes, or procedures. *See* INA, *8 U.S.C. § 1101(a)(15)(L)*. The government's decision to grant entry of an individual pursuant to one of these visa categories is strong evidence of that individual's executive, managerial, or specialized knowledge status for purposes of Article VIII(1). *MacNamara v. Korean Airlines*, 863 F. 2d 1135, 1141-1142 (3d. Cir. 1988).

with the system in place at the parent company, although individuals at Ricoh-USA may provide input into the overall evaluation.

On August 12, 2003, Plaintiff Haluck and Litton ("Plaintiffs and/or Respondents") filed a lawsuit against Ricoh-USA, and a number of executives and managers of the company, including LARRY VAUGHN ("Vaughn"), HARUO UESAKA ("Uesaka"), YOJI IDE ("Ide"), YOSHIHIRO NOMURA ("Nomura"), HOUSSAM EL JURDI ("El Jurdi"), and YASUAKI MURAMATSU ("Muramatsu"). Respondents allege that Ricoh-USA intentionally discriminated against them on the basis of "national origin and race" in violation of the Fair Employment and Housing Act ("FEHA") (*California Government Code § 12940),* when Ricoh-Japan placed Japanese nationals on a temporary basis in key management and technical positions at Ricoh-USA.[3]

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[3] Respondents further allege that when they complained about the purported discrimination, Petitioners retaliated against them by failing to consider them for promotions and corresponding raises in pay, failing to prevent discrimination, perpetrating adverse employment actions against them in violation of public policy, breaching an implied employment contract in bad faith, and thereby causing them emotional distress. Litton further alleges Petitioner misrepresented the nature of his employment with Petitioner, upon which he relied to relocate to California, and ultimately terminated him in retaliation for his complaints.

On May 28, 2004, Ricoh-USA moved for summary adjudication of several of Plaintiffs' claims for discrimination on grounds that, *inter alia,* these discrimination charges were barred by the Treaty of Friendship, Commerce and Navigation between the United States and Japan. *See Article VIII(1) of U.S.-Japan FCN Treaty* attached hereto as Exhibit 13 of the Appendices filed concurrently herewith. On September 29, 2004, the California Superior Court denied Ricoh-USA's motion for summary adjudication as to Respondent's claims for discrimination on the basis of race and national origin.

Nevertheless, the California (Trial) Superior Court specifically stated that it disagreed with the federal case law and any interpretation of the Treaty so far as Petitioner Ricoh-USA was concerned. *See* Exhibit "14" at pages 5-6. *See, also,* Exhibit "5" at page 2, in which the court declared that the case of *Kirmse v. Hotel Nikko*, 51 Cal 4th 311, 321 (1996), as a statement of California law, controlled and supported the trial court's denial of Petitioner Ricoh-USA's invocation of the U.S.-Japan Treaty. Indeed, the court specifically ignored the holdings of *MacNamara v. Korean Airlines*,

863 F. 2d 1135, 1144-45 (3rd Cir. 1988); *Bennett v. Total Minatome Corp.*, 138 F. 3d 1053 (5th Cir. 1998); *Papaila v. Uniden America Corp.*, 51 F. 3d 54, 55 (5th Cir. 1995); and *Fortino v. Quasar Co.* 950 F. 2d 389, 392 (7th Cir. 1991).

A Petition for Writ of Mandate was timely presented to the California Court of Appeal and summarily denied on November 4, 2004. In addition, a Petition for Review to the California Supreme Court, following the issuance of a decision from the California Court of Appeal was also summarily rejected on December 4, 2004.

Having exhausted its appellate remedies within the State of California, and facing the continuing violation of Ricoh-USA's constitutional rights as well as the constitutional rights of its parent company, Ricoh-Japan, Petitioner filed an Application for Emergency Stay of Trial Court Proceedings with Justice O'Connor on December 3, 2004. Notwithstanding trial commencing on December 6, 2004, Justice O'Connor denied Petitioner's Application for Emergency Stay of Trial Court Proceedings on December 3, 2004.

V. REASONS FOR GRANTING THE PETITION

A. There Is a Reasonable Probability That at Least Four Members of this Court Would Conclude That this Case Warrants Plenary Consideration

There is a reasonable probability that four or more Members of this Court would vote to grant *certiorari*.

1. This Court previously granted certiorari to review a closely related case arising out of a similar dispute. *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 102 S. Ct. 2374, 72 L.Ed.2d 765 (1982). This instant case presents Constitutional issues not addressed by the *Sumitomo* decision. *See* 457 U.S. at 189. The instant Petition for a Writ of Certiorari presents related questions under Articles I and II of the United States Constitution and the Supremacy Clause of the United States Constitution.

2. This Court's review of the California Supreme Court's decision is warranted because the California Supreme Court "decided an important federal question that conflicts with relevant decisions of this Court," *U.S. Sup. Ct. R. 10(c)*. As discussed in greater detail below, this case presents important questions regarding

the Supremacy of the U. S. Constitution, Treaties and federal court cases.

3. There is a profound national interest in ensuring the stable and consistent conduct of foreign affairs and conduct of foreign commerce. This national interest also includes the promotion of investments by foreign companies in the U.S. economy as stated in these FCN Treaties. *See Art. I of the U.S.-Japan FCN Treaty, 4 U.S.T. 2063 (1953); Art. II, U.S. - France FCN Treaty, 11 U.S.T 2398 (1959); Art II, U.S. Korea FCN Treaty, 8 U.S.T 2217 (1956).*

B. Petitioners Are Likely to Prevail on the Merits

There is at least a "fair prospect" that Petitioner will prevail on the merits in this case.

1. Respondents' Claims for Discrimination are Barred by the U.S.-Japan FCN Treaty

Respondents allege Ricoh-USA discriminated against them on the basis of their "national origin and race" in violation of the Fair Employment and Housing Act ("FEHA"). (*Cal. Govt. Code §* 12940). The discrimination as alleged by Respondents, however, is

in reality Ricoh-Japan's placement of Japanese nationals – employed by Ricoh-Japan – on a temporary basis in key management and technical positions at Ricoh-USA as permitted by the Treaty of Friendship, Commerce and Navigation between Japan and the United States ("U.S.-Japan FCN Treaty"). *See, Commerce and Navigation*, April 2, 1953, U.S.-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863. Thus, Respondents' claims that this placement of Japanese citizens at Ricoh-USA discriminated against them on account of their national origin and race in violation of the FEHA simply cannot stand in the face of the U.S.-Japan FCN Treaty.

2. The Alleged Discrimination Against Respondent Is Ricoh-Japan's Temporary Assignment to Ricoh-USA of Japanese Citizens as Executives and Technical Experts in Accordance with the U.S.-Japan FCN Treaty

In 1953, the United States and Japan signed the Treaty and Protocol Between the United States of America and Japan Regarding Friendship, Commerce and Navigation ("U.S.-Japan FCN Treaty").

4 U.S.T. 2063, T.I.A.S. No. 2863. Originally intended to encourage U.S. investments abroad in Japan as it recovered from World War[4] the U.S.-Japan FCN Treaty also promotes direct investment by Japan in the United States. *Id.*

To facilitate seamless management of Japanese companies operating within U.S. boundaries, the U.S.-Japan FCN Treaty[4] recognizes the right of these companies to retain certain classes of employees, such as executives, attorneys or technical experts "of their choice." *See* U.S.-Japan FCN Treaty, art. VIII. Specifically, Article VIII(l) of the U.S.-Japan FCN Treaty provides:

> "Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other *technical*

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[4] After the Second World War, the United States negotiated Friendship, Commerce and Navigation ("FCN") treaties with over forty-eight nations to promote overseas investments by U.S. companies in countries recovering from World War II. The treaties guaranteed certain legal protections for U.S. investors abroad and, in return, guaranteed protection to foreign businesses operating in the United States. *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 182 (1982) [citing Herman Walker, Jr., Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice, 5 Am. J. Comp. L. 229-232 (1956)].

experts, executive personnel, attorneys, agents and other specialists of their choice."

4 U.S.C. 2063, 2070 [emphasis added].

The provision outlined in Article VIII of the U.S.-Japan FCN Treaty was included among the treaty provisions "for the limited purpose of securing to foreign investors the freedom to place their own citizens in key management positions, thus facilitating their operational success in the host country." *MacNamara v. Korean Airlines,* 863 F.2d 1135, 1144-45 (3d. Cir. 1988) [construing Article VIII(1) of the Korean FCN Treaty, which is nearly identical to that of the U.S.-Japan FCN Treaty].[5] Courts generally agree that Article VIII necessarily affords each such company the right to prefer its own citizens to those possessing U.S. citizenship. *Bennett v. Total Minatome Corp.,* 138 F. 3d 1053 (5th Cir. 1998) [construing Article

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[5] Nevertheless, despite its limited purpose, both parties to the treaty deemed the provision, and its concomitant right to place the signatories' own nationals in managerial, technical, and confidential capacities, "to be critical." *Wickes v. Olympic Airways,* 745 F. 2d 363, 367-368 (6th Cir. 1984) (construing Article XII(4) of the Greek FCN Treaty, which contains language similar to that of the Japanese FCN Treaty).

VI of the U.S.-French FCN Treaty, which is similar to Article VIII of the U.S.-Japan FCN Treaty]; *Papaila v. Uniden America Corp.*, 51 F. 3d 54, 55 (5th Cir. 1995) [construing Article VIII(1) of the U.S.-Japan FCN Treaty]; *MacNamara,* 863 F. 2d at 1144. This is true even if the company does so as replacement for or instead of existing company personnel. *MacNamara,* 863 F. 2d at 1144. As such, "discrimination in favor of foreign executives given a special status by virtue of a treaty and its implementing regulations is not equivalent to discrimination on the basis of national origin or race." *Fortino v. Quasar Co.*, 950 F. 2d 389, 392 (7th Cir. 1991) [construing Article VIII(l) of the U.S.-Japan FCN Treaty].

In reliance on Article VIII(l) of the U.S.-Japan FCN Treaty, Ricoh-Japan assigns on a temporary basis several of its own managers and technical experts to work at Ricoh-USA so as to implement rapidly evolving technological developments from the parent to Ricoh-USA and ensure the quality and consistency of the products that, as such, when the need for highly specialized technical skills arises, Ricoh-USA relies on its parent to temporarily transfer individuals from Japan to the United States, which Ricoh-Japan

properly does pursuant to non-immigrant visas specifically designed for such purposes.

Consequently, to the extent Respondents, Litton and Haluck claim that Ricoh-USA-Japan's placement of Japanese citizens in positions at Ricoh-USA constitutes discrimination on the basis of national origin or race, such claims simply cannot stand given the provisions of the U.S.-Japan FCN Treaty and Ricoh-USA-Japan and Ricoh-USA's reliance thereon. *Fortino,* 950 F.2d at 392.

3. As a Subsidiary of Ricoh-Japan, Ricoh-USA May Invoke the Rights of its Parent Provided for Under the U.S.-Japan FCN Treaty

There has been much debate about what entities may properly rely upon the provision outlined in Article VIII as relates to their choice of executives and technical personnel. Indeed, according to the U.S. Supreme Court, once a Japanese corporation incorporated a U.S. domestic subsidiary, the subsidiary was technically an American corporation and thus unable to assert rights under the U.S.-Japan FCN Treaty in their own right. *Sumitomo Shoji America. Inc. v. Avagliano,* 457 U.S. 176, 189 (1982). The *Sumitomo* Court

nevertheless expressed "no view as to whether [a U.S. subsidiary] may assert any Article VIII(l) rights of its parent", and thus left open the question. *Sumitomo Shoji America. Inc. v. Avagliano,* 457 U.S. 176, 189, 190 n.19 (1982) [construing U.S.-Japan FCN Treaty, art. XXII(3)].

In the ensuing two decades since *Sumitomo* was decided, numerous federal Courts of Appeal have relied on the *Sumitomo* Court's decision, and Footnote 19 in particular, 457 U.S. at 190 n. 19, and determined that, in furtherance of the spirit and purpose of the FCN treaties, domestic subsidiaries must be permitted to assert the treaty rights of their parent. *Fortino,* 950 F. 2d at 393. *See also, Bennett,* 138 F. 3d 1053; *Papaila,* 51 F. 3d 54; *MacNamara,* 863 F. 2d 1135.

According to *Fortino* and its progeny, by distinguishing the *Sumitomo* Court's decision on the basis that, in that case, "there was no contention that the parent had dictated the subsidiary's discriminatory conduct, the Supreme Court left open the question whether the subsidiary might in such a case assert any of its parent's treaty rights." Indeed, these subsequent Court of Appeals cases

deemed the subsidiary's reliance on the treaty necessary so as "to prevent the treaty from being set at naught." *Fortino,* 950 F.2d at 393. *See also, Papaila,* 51 F.3d at 55. In addition, as all of these cases recognized, there is a vast difference between, on the one hand, a corporation asserting rights afforded under a federal treaty and thereby exerting a preference for one's own citizens so as to ensure protection of its business interests and, on the other hand, a corporate entity illegally discriminating on the basis of national origin and race. *Id.*

4. Ricoh-USA Has Third Party Standing to Invoke the Rights of Ricoh-Japan Under the Treaty

Based on the U.S. Supreme Court's opinion in *Edmonson,* a litigant "may raise a claim on behalf of a third party if the litigant can demonstrate that he or she has suffered a concrete, redressable injury, that he or she has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests." *Edmonson,* 500 U.S. at 629. It is clear from the facts of this case that Ricoh-USA has third party standing to invoke the

rights of Ricoh-Japan under the U.S.-Japan FCN Treaty.

First, Ricoh-Japan has suffered, a concrete, redressable injury-in-fact sufficient to have a substantial stake in the outcome of this litigation. *Edmonson,* 500 U.S. at 629; *Powers v. Ohio,* 499 U.S. 399 (1991). Indeed, Ricoh-Japan's future rights to conduct business pursuant to the U.S.-Japan FCN Treaty are inextricably tied to the way in which Ricoh-USA conducts its daily business, especially should such conduct be found to be proscribed by or in conflict with the anti-discrimination statutes as alleged by Plaintiffs/Respondents. Thus, Ricoh-Japan clearly has a stake in the outcome of this case. *Id. See also, Singleton v. Wulff,* 428 U.S. 106, 113 (1976) [where party indicates it has performed in the past, and intends to perform in the future, in a way proscribed by the statute or law at issue creates controversy between the two parties at bar].

Second, as has been clearly demonstrated, *supra*, Ricoh-USA has a close relation with the third party, Ricoh-Japan, sufficient to permit Ricoh-USA to raise Ricoh-Japan's rights under the U.S.-Japan FCN Treaty. *Edmonson,* 500 U.S. at 629.

Finally, Ricoh-Japan has not been named in this action and,

as such, is unable to assert its own rights under the U.S.-Japan FCN Treaty. Hence, the parent corporation's absence requires Ricoh-USA to protect Ricoh-Japan's interests in this Court.

Therefore, the relationship between Ricoh-USA and Ricoh-Japan is such that Ricoh-USA is the only effective and recognizable proponent of Ricoh-Japan's rights under the Treaty. *Singleton,* 428 U.S. at 116.

C. Petitioner Will Suffer Irreparable Harm from the Denial of Its Petition for Certiorari and the Balance of the Equities Clearly Favors Issuance of a Stay.

Petitioner will suffer irreparable injury unless a Writ of Certiorari issues in this case. The decision of the Superior Court for the State of California, and the refusal of both the California Court of Appeal and the California Supreme Court to stay the trial court's proceedings in the face of an assault on the Supremacy Clause of the Constitution of the United States imperils and abrogates a federal treaty right protected by the Supremacy Clause. *See United States v. Michigan*, 508 F. Supp. 480, 491(D. Mich. 1980). "Where denial of fundamental interest such as constitutional rights are involved,

damage is presumed to be irreparable and a writ should issue as a matter of course." *Id.* Indeed, where a court decision prevents a party from exercising proper treaty rights, irreparable harm is presumed. *Id.*; *Mille Lacs Band of Chippewa Indians v. Minnesota*, 864 F. Supp. 102, 105 (1994), *citing with approval*, *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1506 (W.D. Wash. 1988).

In the instant case, the California trial court has declared as a matter of law that neither Ricoh-USA or its parent corporation, Ricoh-Japan, may invoke protection under the U.S. -Japan FCN Treaty in response to violations of California State Law concerning employment discrimination. Resolution of whether Ricoh-USA, a Japanese subsidiary based in the U.S. may be barred from exercising constitutional rights set forth in *Fortino*, *Bennett*, *Papaila and MacNamara*, as well as Articles I, II and VI of the United States Constitution must be immediate. This issue cannot be deferred to final resolution through a lengthy trial and appellate process that could literally take years and hundreds of thousands if not millions of dollars in costs, expenditures and consequential expenditures that have yet to be calculated.

D. In the Absence of a Writ of Certiorari Issuing from U.S. Supreme Court, U.S-based Subsidiaries of Japanese Corporations and U.S. Employees Face Eminent and Irreparable Injury.

As typically detailed in Article I or Article II of a FCN Treaty, the United States has a vital interest in encouraging foreign companies to invest in the United States economy by establishing subsidiary operations within the United States. Such investments of capital stimulate and promote jobs, economic development and economic growth of various state, local and ultimately the national economy.

Indeed, the concern of Japanese parent corporations concerning the interpretation of the U.S.-Japan FCN Treaty dates back to the briefing accepted by this very Honorable Court in the *Sumitomo* decision. *See Amicus briefs of Japanese Government, East Asiatic Company, Inc., and C. Itoh & Simple Co., Ltd.* In essence, the concern of all Japanese-based parent corporations with U.S. subsidiaries was articulated in the case of *Spiess v. C. Itoh & Simple Co.*, 643 F. 2d 353, 358-361 & n.2 (5th Cir. 1979). In *Spiess*,

the court declared:

> "Considering the Treaty as a whole, the only reasonable interpretation is that Article VIII (1) means exactly what it says: Companies have a right to decide which executives and technicians will manage their investment in the host country, without regard to host country laws."

Therefore, to allow the trial court decision to stand with respect to Petitioner, violates a fundamental principal of Treaty interpretation in that a Treaty is to be liberally construed to accomplish its overriding purpose. *See*, e.g., *Factor v. Laubenheimer*, 290 U.S. 276 (1933); *Nielsen v. Johnson,* 279 U.S. 47 (1929); *Jeofrey v. Riggs*, 133 U.S. 258 (1890).

Indeed, the court has traditionally construed commercial treaties in an expansive manner, both in determining the parties entitled to claim treaty protection in the means by which those parties exercise their treaty rights. *Kolovret v. Oregon,* 366 U.S. 187 (1961); *Jordon v. Tashiro*, 278 U.S. 123 (1928).

If Japanese corporations cannot control their investments in

U.S. based subsidiaries ***based upon their reasonable expectations*** derived from a plain reading of he U.S.-Japan FCN Treaty, then the entire economic relationship between United States and Japan may become unequivocally altered and disrupted.

X. CONCLUSION

Under these circumstances, the effect of a failure to issue of Writ of Certiorari could well disrupt the economic infrastructure of the United States and potentially create a diplomatic crisis between the United States and Japan. Thus a Review by this Honorable Court is justified by the extraordinary importance of the outcome of this case and the extremely time sensitive nature of relief.

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Respectfully submitted,
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